

PETROLEUM TANK RELEASE COMPENSATION BOARD
MINUTES
Business Meeting
May 23, 2005
Department of Environmental Quality
Metcalf Building Room 111, 1520 East 6th Avenue
Helena, MT

Presiding Officer Barry Johnston called the meeting to order at 10:00 a.m. Other Board members present were Tom Bateridge, Dan Manson, Roger Noble, and Frank Schumacher. Board Attorney Paul Johnson and Executive Director Terry Wadsworth were also present. Greg Cross and Shaun Peterson were absent.

Presiding Officer Johnston welcomed Tom Bateridge to the Board. He also reminded the audience that Presiding Officer Johnston and Mr. Manson are leaving the Board.

Approval Executive Session Topics

Mr. Manson moved to approve the contract with Doney, Crowley, Bloomquist & Uda with regard to the subrogation program. Mr. Noble seconded. **The motion was unanimously approved.**

Mr. Manson moved to accept the settlement offer from Liberty Mutual on the subrogation claims. Mr. Schumacher seconded. **The motion was unanimously approved.**

Approval of Minutes

Presiding Officer Johnston noted that he and Mr. Schumacher were the only two members of the Board present who were also present at the last meeting. He moved to approve the minutes. Mr. Schumacher seconded. Messrs. Bateridge, Manson and Noble abstained from the vote. **The minutes were approved as written by two votes with three abstentions.**

Eligibility – Ruth Graham Property – FacID #56-14130, Rel #4358, Great Falls

Mr. Wadsworth introduced the eligibility issue regarding Release #4358 (Ruth Graham Property). The eligibility analysis is controlled by the Board's eligibility statute, 75-11-308. The specific issue is whether this release satisfies the eligibility requirements of 75-11-308(1)(a), since the release satisfies the other eligibility requirements of the statute. The release satisfies the initial requirement under 308(1)(a) because the release was discovered after April 13, 1989, but the staff initially recommended denial of eligibility because the tank was not in compliance with applicable state rules that the Board had determined apply to the prevention and mitigation of a petroleum release, a requirement of 75-11-308(1)(a)(ii).

However, Release # 4358 may qualify for eligibility under an alternative basis provided by 75-11-308(1)(a)(i). The issue under that subsection is whether the tank was in compliance with 75-11-509 at the time the release was discovered. That is a DEQ statute, thus the Board needs to look at the DEQ definition of "owner" to determine whether this tank was in compliance with 75-11-509. If that definition is applied, only 75-11-509(8) would apply to this release, and that subpart of -509 requires that a person may not have placed a regulated substance into the UST without a valid operating permit.

In response to a question from Presiding Officer Johnston, Mr. Wadsworth clarified that when the DEQ definition of "owner" is used, the issue of compliance with 75-11-509 is limited to compliance with 75-11-509(8), and what was then required was a statement from Mrs. Graham to the Board as to whether she had ever placed a regulated substance into the tank.

Presiding Officer Johnston then asked Paul Johnson, the Board attorney, for his understanding of the issue.

Mr. Johnson stated his understanding of the facts. Mrs. Graham bought the property after the tank had become inactive, and never operated or used it. To be found eligible under 75-11-308(1)(a)(i) a tank must be in compliance with 75-11-509 when the release was discovered. Whether the tank was in compliance with 75-11-509 depends on a couple of definitions that the Department has established by rule: "inactive tank" and "owner". "Inactive tank" is defined at ARM 17.56.101(31), and under that definition this tank qualifies as an inactive tank for the purpose of determining compliance with 75-11-509. The particular section of 75-11-509 that applies to inactive tanks is 75-11-509(2). The question then

becomes whether Mrs. Graham qualifies as an “owner” as that term is used in 75-11-509(2). Under the DEQ definition at 17.56.101(45)(b), she is not an owner for 75-11-509(2) purposes, because by the time she purchased the property the tank was already inactive. Under these particular circumstances the Board can determine that this particular inactive tank was not out of compliance with 75-11-509(2) and has satisfied the eligibility requirement of 75-11-308(1)(a)(i).

Mr. Johnson pointed out that the analysis was a little confusing because two definitions of owner are involved. One is the definition of “owner” in 75-11-302; that definition applies to the term “owner” as it is used in the eligibility statute, 75-11-308. Under that definition, Mrs. Graham qualifies as an “owner” for eligibility purposes. The other definition is related to the issue of compliance with 75-11-509; since that is a DEQ statute, the DEQ definition of “owner” in 17.56.101 applies to the compliance analysis.

Mr. Johnson added that an important part of the rationale for the analysis supporting a finding of eligibility is that this tank was out of service and inactive at the time that the Grahams purchased the property in 1976, and his understanding that the Grahams never operated or used the tank for any purpose. Also, the Grahams are not owners of the tank under the DEQ definition, for purposes of determining compliance with 75-11-509. Finally, DEQ had no knowledge of the tank until Mrs. Graham brought it to their attention. At the request of the Department, she obtained a permit and properly removed the tanks on August 11, 2004. In addition, Mrs. Graham has done everything requested of her by the Department since that time to clean up the release.

Mr. Manson asked if the release would be eligible or ineligible if the person who last operated the tank still owned it.

Mr. Wadsworth indicated it would be ineligible, because the owner would have to comply with active tank UST compliance rules or inactive tank UST compliance rules, depending on the tank’s status.

Mrs. Graham addressed the Board and in response to a direct question from the Board she answered that during the time that the Graham’s owned the property they had never put any petroleum product into the tank.

Given Mrs. Graham’s statement that she had never put any regulated substance into the tank, Mr. Manson moved (and the motion was later clarified) to find the release eligible under the Board’s statute (75-11-308, MCA) since the Grahams are an “owner” (75-11-302); the inactive tank was considered within compliance with the Department’s statute (75-11-509(2), MCA) since the Grahams would not be considered an “owner” under the Department’s definition (ARM 17.56.101); and since the Grahams would be considered a “person” who did not put a regulated substance in the tank without a permit (75-11-509(8), MCA). Mr. Schumacher seconded. **The motion was unanimously approved.**

Ratification of Christensen Residence Claims – FacID #56-14158

The Board staff recommended denial of claim #20050303L (for lost rent) and claim #20050307A (for interest on a bank loan) under §75-11-307(c)(b), MCA, and ARM 17.58.342(2)(h), as applicable. The costs are not considered corrective action costs. Mr. Christensen disputed the denial.

Lee Bruner, attorney with Poore, Roth & Robinson, PC, rose to represent Mr. Christensen. Mr. Bruner stated that they are not contesting the denial of the claims. The costs are clearly not eligible under the rules. However he requested, and was granted, an opportunity to discuss the release with the Board. He provided a brief history of the site, indicating that approximately 85 gallons of product were spilled. Due to the vapors inside and outside the house, machine noise of the vapor extraction equipment, and contamination in the soil, the property is neither rentable nor saleable. The owner is concerned that contamination will migrate to other property nearby and Flathead Lake, half a mile away. As well, Mr. Christensen is facing serious financial hardship as a result of the release and its effects. Mr. Bruner believes the Department will soon request a corrective action plan to remove the structure. He requested that the Board authorize the staff to pay for taking the house down and scraping out the contaminated soil. Since this will exceed the \$25,000 limit of authority the staff has, Mr. Bruner is asking that the Board grant the staff authority to pay for the removal of the structure without the need to bring the claim to the Board if it is more than \$25,000. He also asked to have the claim addressed out of sequence. In addition, he asked that, in the event structure removal is required, the Board discuss the authorized payment for removal of the structure by conference call, rather than waiting for the usual scheduled Board meeting, in an effort to keep the cleanup moving forward. Finally, he asked to open a discussion with the board on an agreement on costs and attorney’s fees to bring an action against Cenex.

Mr. Schumacher asked who, specifically, within the Cenex companies was concerned with the matter. He was informed that Cenex of Ronan delivered the oil.

Mr. Manson asked when the Board could expect a determination of whether or not the structure would be removed.

Mike Trombetta, Bureau Chief, Hazardous Waste Site Cleanup Bureau, stated that the Department is not anticipating tearing down the structure at all.

Presiding Officer Johnston asked Mr. Bruner for an estimate of the value of the home, and whether it would be torn down or merely moved and replaced.

Mr. Bruner indicated the structure is valued at approximately \$200,000. Mr. Christensen stated that the house has a full basement and moving it and replacing the full basement will cost as much as demolishing the structure.

Presiding Officer Johnston stated for clarification that what Mr. Bruner was asking for was to give the Board staff authority to approve structural removal and associated costs over \$25,000 if such costs are approved by the Department.

Mr. Wadsworth suggested the Board grant the Presiding Officer authority to approve a grant of authority to the staff, in the event costs exceed \$25,000 to remove the structure.

Mr. Manson moved that the Board authorize the Board staff, in the event that the Department determines the structure must be removed, to seek approval of costs over \$25,000 from the Presiding Officer. Mr. Bateridge seconded. **The motion was unanimously approved.**

Eligibility Ratification

Mr. Wadsworth informed the Board of the eligibility applications before the Board. (See table below). He stated that the Ruth Graham property listed on the table had been granted eligibility earlier in the meeting.

Mr. Manson moved to ratify the eligibility determinations contained in the eligibility table, with the exception of the Ruth Graham property (FacID #56-14130), which was determined to be eligible. Mr. Noble seconded.

Dennis Franks of RAM requested that the Hightower property (FacID #56-14109) be withdrawn from consideration at this time.

Mr. Manson amended his motion to ratify the eligibility determinations contained in the eligibility table, with the exception of the Ruth Graham property, which was determined to be eligible, and the Hightower Property, which is tabled until the July 2005 Board meeting. **The motion was unanimously approved.**

| Board Staff Recommendations Pertaining to Eligibility From March 8, 2005 thru May 9, 2005 | | | | |
|--|----------------------------|---------------|-------------------------------|--|
| Location | Site Name | Facility ID # | DEQ Release # Release Year | Eligibility Determination – Staff Recommendation Date |
| Great Falls | West Gate Exxon | 07-04004 | 00548 12/13/1986 | Ineligible – release discovered prior to 4/13/89 |
| Fairview | Ferrellgas | 42-08642 | 4380 12/1/2004 | Eligible – no reported violations 3/16/05 |
| Great Falls | Westgate Exxon | 07-04004 | 549 4/13/1989 | Eligible – no reported violations 3/16/05 |
| Bozeman | Former Farmers Union Co-op | 16-13701 | 2970 7/1/1996 | Eligible – no reported violations 3/23/05 |
| Bigfork | Glenn Ross Residence | 56-14159 | 4381 Nov 2004 | Eligible heating oil release– AST with underground line 4/8/05 |
| Polson | Mac-Mont Warehouse | 24-13137 | 1691 May 1993 | Eligible gasoline and commercial heating oil tank 4/14/05 |
| Scobey | Nash Brothers, Inc | 10-10800 | 3821 Oct 1999 | Eligible ASTs gasoline, diesel, and heating oil 4/15/05 |
| Ronan | Lake County Road Shop | 24-05664 | 4072 Nov 2001 | Eligible USTs. No reported violations. 4/15/05 |

| | | | | |
|-------------|----------------------------|----------|-------------------|---|
| Hamilton | Valley Furniture | 56-14123 | 4328 Mar 2004 | Eligible commercial HO tank. No violations 4/15/05 |
| Gardiner | Gardiner Exxon | 34-06531 | 4172 Apr 2003 | Eligible – No noted violations 4/20/05 |
| Great Falls | Ruth Graham property | 56-14130 | 4358 8/11/2004 | Ineligible - Tank lacked spill, overfill & corrosion protection 4/21/05 BOARD GRANTED ELIGIBILITY |
| Silver Gate | Hightower property | 56-14109 | 4274 Sep 2003 | Ineligible –Tanks lacked spill, over-fill & corrosion protection. 4/27/05- WITHDRAWN FROM RATIFICATION BY BOARD |
| Red Lodge | Rock Creek Exxon | 05-09748 | 2941 June 1996 | Eligible – no violations noted 5/3/05 |
| Big Sky | Frontier Construction, Inc | 99-95003 | 4396 Mar 2005 | Eligible – no violations noted 5/6/05 |
| Chinook | Pehrson's Service | 03-06475 | 3824 Oct 1999 | Eligible – Tanks were in temporary closure. 5/9/05 |

Claims over \$25,000

Mr. Wadsworth presented the Board with the claims for amounts greater than \$25,000 since the last Board meeting. (See table below). There were three claims totaling \$97,212.93. Mr. Schumacher moved to approve the claims over \$25,000. Mr. Manson seconded. **The motion was unanimously approved.**

| Location | Facility Name | Facility ID# | Claim # | Claimed Amount | Reimbursed |
|--------------|---------------|--------------|-----------|----------------|--------------------|
| Glasgow | Anderson Oil | 53-06093 | 20050202E | \$28,591.62 | \$28,591.62 |
| Glasgow | Anderson Oil | 53-06093 | 20050427B | \$33,208.24 | \$33,208.24 |
| Helena | Noon's 422 | 25-09772 | 20050502A | \$35,413.07 | \$35,413.07 |
| Total | | | | | \$97,212.93 |

Weekly Reimbursements

Mr. Wadsworth presented the Board with the summary of weekly claim reimbursements for the week of March 16, 2005 through the week of May 11, 2004 for Board ratification. (See table below). There were 236 claims, totaling \$507,640.19. Mr. Wadsworth noted that there are eighteen claims with zero reimbursement in the packet: Two for Farmers Union Oil in Terry (release ineligible), one for DNRC Trust Lands in Bonner (Greenough Hill Cabin Former Gas Station - tank removal costs), and 15 for Town Pump-Great Falls, associated with ineligible Release #552.

| <u>WEEKLY CLAIM REIMBURSEMENTS</u> May 23, 2005 BOARD MEETING | | |
|--|--------------------------------|--------------------------------|
| <u>Week of</u> | <u>Number of Claims</u> | <u>Funds Reimbursed</u> |
| March 16, 2005 | 34 | \$67,234.80 |
| March 23, 2005 | 38 | \$90,680.15 |
| March 30, 2005 | 33 | \$77,266.55 |
| April 6, 2005 | 17 | \$46,424.95 |
| April 13, 2005 | 23 | \$76,828.18 |

| | | |
|-----------------------------|------------|---------------------|
| April 20, 2005 | 29 | \$48,030.35 |
| April 27, 2005 ¹ | 27 | \$30,149.84 |
| May 4, 2005 | 15 | \$35,503.17 |
| May 11, 2005 | 20 | \$35,522.20 |
| Total | 236 | \$507,640.19 |

Town Pump Great Falls, FacID #07-08700, Releases #552 and #2584

Mr. Manson asked what was going on with Great Falls Town Pump.

Mr. Wadsworth gave a brief summary of the events concerning the Great Falls Town Pump hearing and decision. In 2003 the staff recommended that a claim filed on the site be split 50/50 between the two releases at the site, one eligible and one ineligible. The owner/operator contested the split and the matter was referred to a hearing examiner. In August 2004, the Board's counsel advised that the Board reject the examiner's findings and send the matter to another hearing. The Board declined to go to another hearing and acknowledged they had the hearing results. In October 2004 the staff brought the original claim back to the Board for action on the claim, and the Board voted that all the claims currently submitted for release 2584 be paid at 100%. He indicated that has been done. The claims in the current packet were submitted by the owner/operator on the ineligible release.

Mr. Bruner, representing Town Pump, expressed frustration at being before the Board again on a matter he thought was settled. He presented the history of the site and its releases. The first release was discovered before the Board was in existence. In 1998 the second release, in a different part of the facility, was discovered and determined eligible for reimbursement. He noted that the matter went to hearing after the staff recommended splitting the costs on the site between the two releases. He stated that the hearing examiner determined that 100% of the corrective action costs were associated with the eligible release. The Board's counsel recommended rejection of the examiners findings and, after presentations by both sides on the matter, the Board elected to adopt the proposals of the hearing examiner in August 2004. Mr. Bruner and Town Pump interpret those actions to mean that the Board adopted the findings and conclusions of the hearing examiner. In October 2004, the issue was raised about what is eligible for reimbursement. The findings and conclusions were adopted, but it was never said that the claims were eligible. The Board noted its intent that the claims associated with the eligible release be paid. Mr. Bruner stated that all the claims currently recommended for zero payment because they were submitted for release 552 were submitted before the hearings. The hearing examiner determined that everything done on the site was associated with the eligible release and the Board approved that decision. Now the claims are being denied because they are associated with the ineligible release. He proposed a motion, as follows: "No claims on this site will be denied on the basis that the corrective action costs are associated with release 552 unless the DEQ provides written documentation to the Board Staff specifically detailing and identifying new facts supporting the conclusion that the cost is associated solely with corrective action for release 552, the ineligible release." (original emphasis)

Presiding Officer Johnston asked what criteria are being used to determine whether the claim is associated with 552 or the eligible release (2584).

Mr. Wadsworth stated that the Board instructed the staff, in October, to pay the currently submitted claims associated with release 2584, which has been done. The staff was not instructed to pay the claims associated with in ineligible release.

Presiding Officer Johnston then asked if the release number on the claim forms was 552.

Mr. Bruner deferred to Stuart Blundell, the consultant on the site.

Mr. Blundell, Integrated Geoscience, stated that the first four claims on the site were based on corrective action performed at the site between June 6, 1999 and 2000, and were all prepared under 2584. They received a letter from Mike Trombetta, dated July 19, 2000, saying that 50% of the work done at the site will be eligible for consideration under 2584 and the other 50% will go to 552. The Board staff then instructed the consultants to split all costs and claims between the two releases, because the Department was directing Board staff that is the way the costs will be apportioned. In addition, because of the two-year rule, if the claims were not filed, and the hearing was lengthy, the costs could not be claimed more than two years after incurred.

Mr. Wadsworth responded that there were claims submitted for both 2584 and 552. Only one claim was brought to a hearing. There is no documentation that states that the hearing expanded beyond the one claim. Board staff is relying on

the Department to make the technical evaluation on what portion of the remediation at the site was attributable to the eligible release and what portion was attributable to the ineligible release. The Department believed that the contamination was primarily a result of release 552. He asked that the Department come forward and explain the current state of the contamination at the site.

Mr. Manson recalled that during previous discussions a graphic was presented wherein two circles that overlapped one another represented the zones of contamination for each release. It was his understanding that everything that was in the 2584 circle would be reimbursed at 100%, while anything that was outside the 2584 circle would not be reimbursed at all. He asked if the claims at issue are within the 2584 circle, and whether the Department has determined that any of the claims are solely 552. If not, they will be paid 100%.

Mr. Brunner stated that everyone has already testified and the examiner specifically found that none of the disputed costs being claimed by the claimant are because of Release 552. In addition, the hearing examiner heard all of the claims, not just the specific claim disputed.

Mr. Trombetta said the Department has not looked at the claims to specifically determine what costs are outside the 2584 circle. Both releases are separate, and 552 is still the major release and covers the larger part of the area.

Mr. Blundell stated that it is not true that the Department has not reviewed the claims. Every work plan and cost was reviewed and approved by the Department. The issue here is the administrative issue of taking an approved cost and attributing half of it to a number. There is no new work outside the boundaries of the hearing examiners review. 50% of every dollar was submitted under 552 so the costs wouldn't be thrown out by the two-year rule.

Mr. Manson asked if each of the claims was a mirror image claim of one submitted under 2584.

Mr. Wadsworth stated that he didn't believe all of them were. He also noted that in the case of the work plans, the Department asked for work to be done on behalf of 552 and 2584, and when the response came from the consultant only 2584 was listed. The Department's request was for work associated with two releases and the consultant attributes the work only to 2584. In addition, the hearing examiner extended his decision outside the information submitted to him. He asked that Katherine Orr, the attorney for the Board at the hearings, address that issue.

Ms. Orr stated that there is no exhibit in the hearing documents that contains the claims that are now before the Board. The hearing examiner never reviewed any of the claims currently before the Board. Statements have been made that the examiner addressed everything that has been done on the site. A discussion of the flow of contamination and theories about overlap of the releases was presented to the examiner. The Board presented information indicating that 552 was the larger release and that there was no commingling of the plumes. The examiner decided to reject that contention. The claims currently at issue with the Board have not been presented to the Board before, and the examiner has never seen them.

Mr. Bruner stated that what Ms. Orr said is not true. The hearing examiner reviewed each work plan and all the work done at the site. Mr. Bruner read a portion of the hearing examiner's conclusions, as follows, "I conclude that none of the disputed costs being claimed by the claimant are because of Release 552. I also conclude that none of these costs are from any other release that occurred at the site prior to April 1998. I conclude that all of these costs are due solely to release 2584."

Presiding Officer Johnston asked Ms. Orr if the previous statement comports with her recollection of the matter.

Ms. Orr emphasized that the examiner's statement addresses only the disputed costs being claimed by Town Pump. The disputed costs are only those associated with the claim submitted to the examiner in the first place.

Presiding Officer Johnston asked for clarification from Mr. Blundell that the 552 claims were left out of what was submitted to the hearing examiner and that all of the costs were incurred after the date of release 2584.

Mr. Blundell reiterated that the costs were split between claims for 2584 and 552 because the Department told them to, and that they were all incurred after the date of release of 2584.

Presiding Officer Johnston asked to review the proposed motion again.

Mr. Wadsworth expressed his concerns with regard to the proposed motion. If the Department directs the owner and operator to investigate or remediate contamination they believe is fully associated with 552, would those costs be considered eligible under 2584?

Mr. Manson summed up what he believed was the Board's position on the matter; that anything within the 2584 circle is eligible. If there are 552 costs included, so be it, the Board will pay for them. The proposed motion seems to say that if costs can be identified as attributable to 552, then the Board won't pay those costs. He asked if DEQ can provide written documentation that there are costs associated with 552.

Mr. Trombetta addressed the Board and stated that he has not reviewed these claims, and that Mr. Blundell was discussing work plans, not claims. He is unable to discuss whether the claims before the board are for costs solely for 552. The Department does not have clear science on the center part of the plume establishing which release it belongs to; however, it seems evident from the science the Department does have that the distal part of the plume could not have come from 2584, because things move slowly in the soil there and the contamination didn't have time to move that far. Currently, DEQ does not even know where the end of the plume is. It is currently moving into private property. It might be possible to do some forensic chemistry to determine chemically which release is which, but it is expensive, and would not be considered part of the cleanup. If the Board wants to spend that kind of money, it could be done, but the Department has never considered it necessary for cleanup. There is no science at the moment to determine which release contributed to the center of the plume. The Department feels that the second release is the smaller release and would not have contributed much to the groundwater contamination. He introduced the new project officer for the site, Mr. Stephen Opp.

Mr. Wadsworth summarized that 2584 is in the center of a large area of contamination. 552 has been there the longest and had the ability to get out to the edge of the property. From a technical standpoint a circle must be drawn to the furthest possible extent of 2584 and say that anything outside that circle is 552. The proposed motion puts the burden of proof on the Board. He recommended that the burden of proof be on the owner/operator to prove that the costs being incurred for remedial cleanup is associated with the eligible release.

Mr. Blundell stated that he did not call Mr. Trombetta a liar. For him to say that the Department had not reviewed the corrective actions at the site was untrue. He thought the issue was the fact that claims that were submitted under 552, as required by the Department because they had determined that 50% of the costs were split between the two and if they were not submitted before the passage of two years they were going to go away. With respect to Mr. Wadsworth's statement about the size of the plume, there were technical experts brought in by the department from outside the department to look at the remediation work. Mr. Blundell stated that there is technical information available that show Release 552 was a release of approximately 500 gallons, and 450 gallons were recovered.

Mr. Wadsworth explained that when the Department is called to a facility for a release for the very first time, all prior releases, i.e. historical contamination, is rolled into the first release number. So all the releases that have occurred at the Town Pump Great Falls site between the time it first opened and release 552 are subsumed in Release 552. There is evidence that there are several such prior releases, in addition to the 500-gallon release referenced by Mr. Blundell, including one that went over the top of the hotel nest door. All of these releases occurred prior to the existence of the Fund and the Board, and so are ineligible. Release 2584 is a fairly small release. This is why the Department feels that the majority of the contamination at the site is associated with 552. From a technical standpoint, finding out how large the circle is that identifies 2584 will be difficult. The burden of proof should be on the owner/operator, not the Board.

Mr. Blundell stated there are 15 claims that have been denied. The other 50% of those claims, filed under 2584, have been paid. These claims are not for new work, and should be paid. That was the whole point behind the hearings.

Mr. Bruner said the staff is trying to retry the case, rehear the evidence. We shouldn't retry the case.

Mr. Manson stated that he struggles with what the Board will do with future claims. These clearly are the mirror image of claims already paid. The Board has instructed that they be paid, if they are indeed mirror images of the claims paid. How to apportion work toward the distal end of the plume is the issue. The hearings examiner concluded that everything he looked at was related to the new release. There will need to be a line drawn at some point as to the extent of the old release. That is not what is occurring at this meeting. The Board has adopted the hearing examiners conclusion, so going forward the burden of proof probably falls on the Board to define what is not part of 2584.

Mr. Wadsworth stated that he has no problem paying the claims currently before the Board. His concern is where the Board goes when they make the decision on remediation of the long-term contamination on the distal end of the plume. The decision made today will affect what kind of evidence is put in place for that component of the work.

Mr. Bruner stated that he believes his proposed motion addresses that issue. If there are new facts that support the ineligible release as the cause of contamination, then it can be looked at, but until there are new facts it should be eligible work.

Mr. Noble concurred with Mr. Manson's summation. He feels that the costs to further define the plume are not unreasonably expensive. He suggested the Department include, as part of a future work plan, the costs for fingerprinting the release or possibly include lead detection, since some of the contamination may be quite old.

Presiding Officer Johnston asked if the Board is authorized to pay such additional expenses.

Mr. Wadsworth indicated such costs could be viewed as corrective action costs, in terms of evaluating what corrective actions the Board is responsible for.

Presiding Officer Johnston summarized the two issues before the Board. One issue is the claims that have been denied, and the other is the motion proposed by Mr. Bruner. He asked for Mr. Johnson's evaluation of the proposed motion.

Mr. Johnson stated his concerns as follows: the proposal is reversing the usual burden of proof in a MAPA contested case proceeding where a party is coming to a state agency and demanding payment of money from a fund such as the Petro Fund. From a precedential point of view, the Board will want to carefully limit that kind of reversal of the burden of proof to the specific facts of this case, based on the unusual history of the case. He would also like to see more definition of the phrase "new facts".

Mr. Manson stated that he is not in favor of adopting the proposed motion. He does not feel that is necessary to address the claims before the Board. Address the claims by saying they fall within the claims the Board has previously heard and allow those claims on that basis. The Board's instruction to the staff would be that, unless the science suggests future claims are related solely to 552 or some other historic spill, the Board has already determined those claims would be eligible for reimbursement under 2584. This would apply not only to the fifteen claims currently before the Board, but to new work as well.

Mr. Wadsworth stated that there is no work currently being done at the site, though the case managers are looking at other sources of contamination in addition to this facility. Once the Department is able to determine what other sources there may be, there will be future work done on both 552 and 2584, as well as other sources that may be found.

Mr. Schumacher moved to approve the claims included in the packet for payment under prior Board action, in the approximate amount of \$20,000. Mr. Manson seconded. **The motion was unanimously approved.**

Presiding Officer Johnston called for a motion that the Petro Fund expend dollars necessary to determine associated remediation costs for release 552 versus 2584, and that those costs be part of a corrective action plan going forward. That should determine what costs are associated with what release, if that's an issue for the Department.

Mr. Manson made the motion. Mr. Noble seconded. Presiding Officer Johnston asked for questions or comments.

Mr. Schumacher asked who would be determining what costs are actual, reasonable and necessary.

Mr. Wadsworth recommended that the Department bring their information before the Board once a determination of the extent of release 2584 is determined, so that all parties to the matter can review the information and determine their future course of action.

Mr. Blundell stated that he assumes the Department would follow the usual process of requiring a work plan to conduct the work, approving the proposed work plan and having a consultant do the work.

Mr. Schumacher asked if everyone was comfortable with not putting a provision in the motion that the Board review the work. Presiding Officer Johnston said such a concern could be added to the motion.

Mr. Noble said the matter should follow the standard process for an onsite investigation. DEQ gets split samples and can do what they want for quality control purposes.

Mr. Wadsworth asked for a clear motion.

Mr. Manson stated the motion as follows: that the Board authorize the staff and the Department to expend Board funds to undertake a study, with the purpose of determining whether a line can be drawn between Release 2584 and Release 552, and that those costs, although they wouldn't normally be considered actual, reasonable and necessary in the cleanup of a site, are considered necessary for this site in determining where to draw the line. Included in the motion is that the Department will use their standard practices and procedures as far as work plans go in developing whatever testing needs

to be done. The costs associated with the work plan will be subject to Board review and also the results of any work done will be shared with the Board as soon as results are available. Mr. Schumacher seconded. **The motion was unanimously approved.**

Mr. Wadsworth clarified that the fifteen claims attributed to Release 552, having been addressed, will be removed from further action on the weekly reimbursements, leaving the claims appearing in the tables and the remaining three zero reimbursements.

Mr. Schumacher moved to ratify the reimbursements for the weeks of March 16, 2005 through May 11, 2005 (see table above) and include the three zero reimbursements, for Farmers Union Oil and DNRC Trust lands. Mr. Manson seconded. **The motion was unanimously approved.**

Presiding Officer Johnston called a brief recess at 11:43 am. The meeting resumed at 11:54 am.

Amendments to ARM 17.58.326

Mr. Wadsworth reminded the Board of the statute changes that occurred in the recent legislature with Senate Bill 145. As a result of the bill, the representation on the Board has changed, and some of the long-term compliance issues were moved from the eligibility portion of the statute and into the reimbursement portion. As a result, some references to the statute in the rule are misaligned and need to be adjusted. The staff believes that some of the references can be corrected without the need for a hearing. The staff recommends that the Board move to instruct the staff to have hearings to correct those references so they can get them on the books by July 1. The goal is to have the rule consistent with statute by July 1. In addition, the Department has changed portions of their statute and rules, creating some inconsistent language between the Board's and the Department's that needs to be corrected. The staff suggests a motion by the Board that, to the extent rule changes can be done without a hearing, the staff proceed to make those changes.

In January the Board discussed a conflict between a rule and a statute with regards to an underground storage tank. The situation discussed concerned heating oil tanks that were not removed prior to April 27, 1995. In addition, there was discussion with the Petroleum Marketers regarding above-ground storage tank self-inspection. In 1995, the statute was changed, making certain underground heating oil tanks were no longer regulated by the Department, and the Board did not want to allow those unregulated to be eligible, but to establish a voluntary program for those owners to be eligible. The Board promulgated a rule to address the issue, but that rule was found to be inconsistent with the statute in January 2005. Mr. Wadsworth suggested creation of a work group that includes members of the Board, members of the Department and members from a gas station or the petroleum marketers association to formulate proposed changes to the rules and statute to address the issue of eligibility criteria for regulated and unregulated tanks, and the above-ground storage tank voluntary program the Board would like to implement. He presented a summary of the federal rules concerning underground storage tanks, the types of tanks and substances regulated, and some tank configurations that present a challenge to rule interpretation.

Ronna Alexander, Petroleum Marketers Association, stated that she was uncomfortable with the idea of rule changes without a hearing.

Mr. Wadsworth stated that there are certain things the Board and staff cannot do without a hearing. The only things that can be done to the rule without a hearing are non-substantive changes.

Mr. Johnson, Board counsel, confirmed that and reiterated that the effort is only to make the Board's rule consistent with the legislative changes that occurred this year. There are internal citations in the rules that are incorrect because of changes enacted by the legislature. The statutory changes become effective on July 1, and the rules need to be changed before then, if possible. He also indicated that a motion was not necessary.

Presiding Officer Johnston stated that he will review any changes necessary to make sure citations are to the appropriate portions of the statutes. He instructed Mr. Wadsworth to contact the Board members and others after the Board meeting to determine would join the working group.

Fiscal Report

Mr. Wadsworth presented the Board with the current Fiscal Report. He noted that the budget change document had been issued to transfer funds from the Department's personal services budget to the Board's personal services budget to properly reflect the number of Board staff full-time equivalents (FTEs), bringing that portion of the budget from a negative balance to a positive balance.

Presiding Officer Johnston noted that the FY05 budget shows a negative balance of \$225,000, but there were \$257,000 in loan payments made in the year.

Mr. Wadsworth noted that there will be a positive balance of approximately \$200,000 in the FY05 accrual for claims that will not be paid against that accrual.

There were no questions or comments on the fiscal report.

Board Attorney Report

Paul Johnson, attorney for the Board, advised the Board that a preliminary scheduling order is in place for the Town Pump-Dillon case (see table). The parties have agreed to try to work through some stipulated facts of the case. The matter concerns the site where there were several days of repeated alarms before there was a release discovered. The question is mainly one of statutory and rule interpretation. A scheduling order is anticipated in mid-June.

| Location | Facility | Facility # & Release # | Disputed/ Appointment Date | Status |
|----------------|-------------------------------|--------------------------|-------------------------------|---|
| Boulder | Old Texaco Station | 22-11481 Release #03138 | Eligibility 11/25/97 | Dismissal Pending because cleanup of release completed. |
| Thompson Falls | Feed and Fuel | 45-02633 Release # 03545 | Eligibility | Case was stayed on 10/21/99. |
| Eureka | Town & Country | 27-07148 Release #03642 | Eligibility 8/12/99 | Hearing postponed as of 11/9/99. |
| Helena | Allen's Oil Bulk Plant | 25-01025 Release #02893 | Eligibility 11/29/99 | Case was stayed on 1/21/00. |
| Butte | Shamrock Motors | 47-08592 Release #03650 | Eligibility 10/1/99 | Case on hold pending notification to Hearing Officer. |
| Whitefish | Rocky Mountain Transportation | 15-01371 Release #03809 | Eligibility 9/11/01 | Ongoing discovery. No hearing date set. |
| Lakeside | Lakeside Exxon | 15-13487 Release #03955 | Eligibility 11/6/01 | In discovery stage. |
| Helena | Noon's #438 | 25-03918 Release # 03980 | Eligibility 2/19/02 | Case stayed. |
| Wolf Point | Isle Oil Co | 43-08893 Release #2552 | 3 claim adjustments 12/21/02 | Hearing stayed. |
| Belt | Mary Catherine Castner | 07-12039 | Eligibility 11/22/02 | Mar 12, 2003 stayed for up to one year. |
| Dillon | Town Pump Dillon #1 | 01-08695 Release #4144 | Eligibility 03/07/05 | Hearing examiner appointed. |

He gave the Board an update on the legality of using an appropriation from the Petro Fund for use by the Department as a source of matching dollars for the LUST Trust program. His understanding is that the Petro Fund dollars that are the subject of the appropriation to the DEQ budget are used to defray the Department's costs and expenses in dealing with ineligible releases. Looking at the analysis and the statute, he believes it is a legitimate expense of Petro Fund dollars. The concern he had is that it did not seem that the Board has a very clear idea of how the money is used and how it is moving through the legislative process from the Department's proposed budget to an appropriation to the Department as a line item in their budget. One of the statutes that justify this kind of appropriation also requires the Board to review and comment on such an appropriation. It didn't appear that was happening. The Board should be on board when the appropriation is being discussed.

Board Staff Report

Mr. Wadsworth stated that the number of claims received this fiscal year is 1498 and the number reimbursed is 1529.

Petroleum Release Section Report

Mr. Trombetta presented the PRS Report. He stated that there are only about 15 releases received so far this calendar year. He noted that tanks installed after 1986 are the ones having the largest number of releases, and he considers that alarming since tanks installed after 1986 are the newer ones with spill and overfill protection. It appears that the piping joints attached to those tanks may be the most common problem. This seems to be the case in other states, as well as Montana.

Case Study

Presiding Officer Johnston has asked the Department to present a case study of a leak site at the next several meetings in order to assist the Board members and the public in understanding how the Department handles such sites, what the costs are and how the project will move forward. The site chosen for presentation at this meeting was Jolly O's Gas 'n' Go in Helena given by Pete Bergeron.

Public Forum

Ronna Alexander, Petroleum Marketers Association, addressed the Board about the LUST Trust money. It is a federal fund started some years ago to clean up orphaned tanks with no responsible party or owner. There were billions of dollars paid into the fund from the industry, and the money is not being returned to the states to be used. She suggested that marketers and state government should be lobbying Congress to return that money to the states to be used to clean up such spills. She objects to the use of Petro Fund dollars for the LUST Trust, because the Fund is intended to reimburse owners/operators who follow all the regulations. However, her biggest problem with the matter was that it was not presented to the Board as a line item for their approval at the very beginning. By the time it was identified, there was no opportunity to really discuss the matter.

She also took the opportunity to thank Mr. Johnston and Mr. Manson for their service.

Dennis Franks, RAM Environmental, addressed the Board as a representative of PRAG. He expressed dissatisfaction with the notice the consultants have received concerning the Department's efforts to develop and implement standard reports and site assessments, etc. A meeting was held in January, at which the consultants were told they should not comment because there would be another meeting in May where comments would be taken. The consultants have now received notice that the consultants will follow the new guidelines. PRAG feels that there has been no input from the consultants in the process of developing the standards. The consulting community feels they should be included in the process.

Joe Lauden added that he would be interesting in knowing how much cost has gone into developing the standards, since the consultant community is heavily scrutinized and nitpicked on costs and consultants feel this effort is a slap in the face to the consultants. The consultants are being asked to bear the brunt of cost savings efforts.

Mr. Johnston said he feels the consultants are dragging the Board into the middle of an argument that really belongs to the Department. Ultimately the Board pays for the costs of reports.

Mr. Trombetta stated that the standardized reports were a recommendation of the Legislative Audit. The Board is paying out on a lot of things and there are no standards. In addition, the proposed reports were sent out to the consultants on email, on the web, and a meeting was held. Not one single comment was received from anyone except the Board staff. The decision was made to put the reports into effect so that as people worked with them, they could come up with suggestions for improvement. The Department is hoping for feedback from the consultants to produce a product that works for all parties.

Presiding Officer Johnston and Mr. Manson expressed their appreciation for the opportunity to serve on the Board.

The next schedule Board meeting is July 18, 2005.

Meeting adjourned at 12:42 p.m.

Presiding Officer